of the delinquency entry, the tax collector or his successor in office must make to the county a deed to the property.'

Section 61-1025 as amended by the Session Laws of 1939:

Section 1. The term "delinquent taxes" as herein used shall be deemed and construed to include all general taxes and special assessments and charges entered in county tax rolls and collectible in the same manner as general property taxes, levied, assessed or charged against real property, including taxes on personal property secured by lien on real property.

Section 61-1032 Idaho Code Annotated:

"Effect of Tax Deed as Conveyance.—The deed conveys to the grantee the absolute title to the land described therein, free of all encumbrances except mortgages of record to the holders of which notice has not been sent as provided in Section 61-1027 and except any lien for taxes which may have attached subsequently to the assessment."

Section 30-708, as amended by Idaho Session Laws of 1939:

"Sale of County Property—Procedure—Property Acquired Through Tax Deed—Sales to United States. To sell or offer for sale at public auction at the courthouse door, after thirty days' previous notice given by publication in a newspaper of the county any property, real or personal, belonging to the county, not necessary for its use, except that such personal property not exceeding $50.00 in value may be sold at private sale without advertisement and such sale of real property may be made by the Board of County Commissioners, either for cash or upon such terms as the Board of County Commissioners may determine, and the same must be sold to the highest bidder. The

proceeds from such sales shall be paid into the County Treasury for the use of the county, unless such property has been acquired by tax deed, in which event the proceeds from such sale shall be prorated to the taxing districts in which the property is situated in proportion of each tax for the year of delinquency upon which the tax deed was issued to the county. If such property is sold on terms the Board of County Commissioners may contract for the sale of the same for a period of years not exceeding * ten years, with an annual rate of interest on all deferred payments not to exceed six per cent per annum. The title to all property sold on contract shall be retained in the name of the county until full payment has been made by the purchaser. Any property sold by the Board of County Commissioners under the provisions of this Section, either for cash or on contract, shall be assessed by the County Assessor in the same manner and upon the same basis of valuation as though the purchaser held the record title to the property so sold. The Board of County Commissioners shall have authority to cancel any contract of sale if the purchaser shall fail to comply with any of the terms of such contract, and retain all payments paid thereon. The Board of County Commissioners may by agreement with the purchaser modify or extend any of the terms of any contracts of sale, but the total period of years shall not exceed ten years. Any such sale made by the Board of County Commissioners of property acquired through tax deed shall, subject to the provisions of this Section, vest in the purchaser all of the right, title and interest of the county in the property so sold, including all delinquent taxes which have become a lien on the property since the date of the tax sale certificate upon which any tax deed has been issued, and such Board shall have *discretionary authority* to reject or accept any bid which may be made for a less amount than the total amount of all delinquent taxes, penalties, and interest which may have accrued against any property so offered for sale, including the amount specified in the tax deed to the county. It shall be the duty of the Board of

County Commissioners in advertising any property for sale, under this Act, which has been acquired by tax deed to insert either before or after each description of real estate offered for sale the name of the taxpayer as it appears in the delinquent tax certificate upon which the tax deed held by the county was issued. Whenever a sale or transfer of any real estate acquired by tax deed has been made under the provisions of this Section, the bidder for any such real estate, whether bidding for himself or for another must include or add to such bid the additional sum of one dollar, which sum shall be a fee for recording the deed conveying such real estate to the purchaser. No deed for any such real estate sold under the provisions of this Section shall be delivered to a purchaser or his representative until such deed has been recorded in the county making the sale.

"Provided, that any title to real property heretofore and/or hereafter acquired by any county under a tax deed, which in the judgment of the Board of County Commissioners is suitable for the production of trees and/or as a watershed, may be granted and conveyed by deed, to the United States of America by the county tax collector upon the order of the Board of County Commissioners. The said Board of County Commissioners shall appraise and determine the value of such real property immediately prior to the execution of the deed conveying the same to the United States of America. And the Board of County Commissioners shall accept from the United States of America for and on behalf of the county, as full compensation for each tract and parcel of such real property conveyed, title to stumpage having an approximate value equal to the appraised value of the real property described in the deed or conveyance. All stumpage acquired by the county under the provisions of this paragraph shall be sold by the Board of County Commissioners for a price which shall not be less than its approximate value at the time it was received by the county from the United States of America, and the proceeds of such sale of such stumpage shall be de-

posited in the County Treasury for the use of the county. The execution by the county tax collector of the deed of conveyance to the United States of America conveying any tract or parcel of such real property shall operate to discharge and cancel all levies and/or liens for taxes and special assessments made or created for the benefit of the State, county, school district or any taxing unit or district, and to cancel all titles or claims of title, including claims for redemption, to such real property, asserted or existing at the time of such execution. No public notice of the intention to convey title to any of the real property defined by this paragraph shall be necessary.

"Provided further that when any city or village desires to acquire lands, for the purpose of constructing and maintaining an aviation field, airport, hangars and other air navigation facilities thereon, as provided in Chapter 3, Title 21, Idaho Code Annotated, and the title to all or any portion of the lands so desired for such purpose not exceeding in area 1,280 acres, is vested in any county under tax deed, said land so owned by the county, may be sold and conveyed to any such city or village for such purposes by the county owning the same at a price to be fixed by resolution of the Board of County Commissioners. No public notice of the intention of the county to sell and convey title to any city or village for such purpose shall be necessary.

"Provided further that the Board of County Commissioners may, in their discretion, without previous notice by advertisement or otherwise, grant to the State of Idaho, with or without compensation, for state highway purposes, any real property heretofore or hereafter acquired by the County, by tax deed.

"The execution and delivery by the county of the deed conveying such property to the State, city or village for such purposes, which shall be specified in the deed, shall operate to discharge and cancel all levies, liens, taxes and special assessments made or created for the benefit of the State, county, school district and

all other taxing units and to cancel all titles or claims of title including claims of redemption to such real property asserted or existing at the time of such conveyance."

Approved February 25, 1939. (Italics ours.)

Opinion, Judge C. C. Cavanah, dated June 15, 1942 (omitting formal parts). Boundary County, a municipal corporation of the State by its Commissioners seeks judgment against the defendant to recover the sum of $49,232.63, and interest, or in lieu thereof, that certain tax deeds issued by the County be cancelled and held void and that the defendant be required to make an accounting of the earnings of the farming operations of the lands covered by the deeds, and that said amount be offset against the cash payments made by the defendant in connection with the issuance of the deeds, and judgment for any amount in which the earnings exceed the amount of the payments made by the defendant, and in case the defendant fails to reconvey the lands to the County, that a Commissioner be appointed with authority to execute and deliver to the County the necessary deeds reconveying the land.

The defendant answers and places in issue the principal questions urged by the parties and seeks judgment against the County and Ray Sims, one of the plaintiffs for the sum of $75,000.00 as alleged damages for alleged failure to perform their duty.

The case is one of numerous controversies between the defendant and the County, and the Drainage District, heretofore instituted in the State and Federal

Courts and presents a dispute which probably will bring to a final conclusion the controversies between the parties involving every situation in attempting to drain the District, as every conceivable question has been presented to the Courts for solution.

The principal issues as presented by the pleadings and the evidence relate to whether the County is the real party in interest and whether the tax sale of the lands to the defendant was valid and made in compliance with the laws of the State.

It appears that in December, 1938, the defendant in an action which he brought in the State District Court against the Commissioners of the County and the Drainage District, obtained a preemptory writ of mandate which required the County to execute and deliver to him, deeds to certain real property described, upon the defendant paying to the County, the consideration for the lands, in the amounts set forth in the writ. In compliance with the writ, the plaintiff executed and delivered to the defendant, sundry tax deeds covering the property in question. The manner of paying the full consideration by the defendant was the sum of $22,811.33 in cash and the balance of $49,232.63 in bonds, and bond interest coupons, of the Drainage District.

The lands having been deeded to the County for delinquent general taxes and delinquent Drainage District Assessments, the County attempted to sell them at public sale under Section 30-708 I. C. A., and the defendant, at the sale, bid various sums for the land

set forth in the writ of mandate, which was rejected by the County Commissioners for the reason that this bid did not cover all taxes and assessments against the land.

The total outstanding assessments against the District for drainage purposes was $179,878.90 which does not cover State, County and School taxes levied. The State District Court held that the law relating to the sale of land for assessments and taxes in effect at the time of the delinquencies and under which the land was sold was Section 3423 Idaho Compiled Statutes 1919, and further held in the case of Woldson v. Commissioners of the County and the Drainage District, that upon Woldson "making payment to the said defendants or to the Treasurer of Boundary County, Idaho, for said property the amount of said payment either in cash or its equivalent provided, however, that the amount due to Boundary County, Idaho, for State and County taxes shall be paid in cash."

As to the first proposition, as to whether the County is a real party in interest in the present suit there would seem to be no doubt after considering the issues raised by the pleadings and the evidence, for we find that in previous litigation between it and the officials and the defendant, and especially in the case where the County was the defendant, where the defendant here secured a writ of mandate directed to the officials of the County to execute the deeds in question, and where he claimed that the Commissioners of the County failed to comply with the requirements made

on them by the writ of mandate which provides: "We command you the * * * County Commissioners of Boundary County, Idaho, immediately upon receipt of this letter, laying aside all excuses whatsoever, that you convene in session and take the necessary procedure to, and that you do issue to Martin Woldson a deed conveying to him the property hereinbefore described for the amount set forth, upon him paying to you or to the County Treasurer of Boundary County, Idaho, the consideration for said land and each and every description thereof, in the amount set forth in this writ * * *."

It will be remembered that in the first instance the land was sold to the County, whose officers thereafter attempted to conduct a tax sale and sold it to the defendant, and did not receive cash in full to cover his bid, as part of the consideration of his bid was paid in cash and part in bonds and bond interest coupons.

After considering the above provisions of the writ of mandate which requires the defendant paying to the County or to the County Treasurer, the consideration for the land and each and every description thereof, in the amount set forth in the writ, it is clear to assume that the Court, when issuing the writ of mandate, required the payment by the defendant to be in the amount set forth in the writ, and not in payment in bonds or bond interest coupons, and therefore the County certainly is now interested in setting aside the attempted sale to the Defendant made by its officers where the defendant did not pay for the land in the

manner provided for by the Statute of the State and the decree of the State Trial Court providing that the payment may be made in "Cash or its equivalent," would seem to inject therein the expression "its equivalent" not in compliance with the requirement of the statute, which confines the payment exclusively "in cash" and therefore the expression "its equivalent" may be treated either as surplusage or void when we come to consider the express requirement of the statute, that the payments are to be made "in cash."

The County through its officials is the only party who can comply with the writ and therefore is interested in questioning the validity of the tax deeds issued by one of its officials, and so is it and the plaintiff Sims in defending against a demand for judgment against them in the sum of $75,000.00 as damages.

We approach then, the next question in the case as to whether the tax sale of the land was made in compliance with the State statute, and if not, then the tax deeds issued thereat should be set aside and held void.

As stated, the State District Court held that upon the defendant making payment to the Treasurer of the County either in cash or its equivalent, except the amount due the County for State and County taxes should be paid in cash, tax deeds shall be issued to the defendant upon his bid made at the sale.

The State statute relating to the sale at the time of

the delinquencies of State taxes and assessments and under which the land was sold, provides: "Section 3423. Sale of County Property. To sell at Public auction at the Courthouse door, after 30 days' previous notice given by publication in a newspaper of the County, or posted in five public places of the County, and convey to the highest bidder, for cash, any property, real or personal, belonging to the County, not necessary for its use, paying the proceeds into the County Treasury for the use of the County."

This statute specifically provides that the lands are to be conveyed to the highest bidder for *cash* and the effect of the tax deed is to convey to the grantee absolute title to the land free of all encumbrances except mortgages of record and any lien for taxes which may have attached subsequently to the assessment, Section 61-1032 I. C. A. *Hunt v. City of St. Maries, et al.*, 44 Idaho 700; *Heffner v. Ketchen, et al.*, 50 Idaho 435; *Smith v. City of Nampa, et al.*, 57 Idaho 736; *Thompson v. Goble, et al.*, 58 Idaho 126. It would seem that under the laws of Idaho it is incumbent on those who own special improvement bonds of the District to protect such bond lien for non-payment of tax liens prior to tax sales; *Hunt v. City of St. Maries, et al., supra; Heffner v. Ketchen, et al., supra.*

When the payment of the purchase price of the land is received by the County Treasurer in cash, as required by the State statute, he must then apportion the payment prorata to the various taxing districts, and the funds must be prorated to the various funds in

proportion to the amount levied for various purposes by the Drainage District. Section 30-708 I. C. A., and the County Treasurer cannot apportion bonds, bond interest coupons and warrants into the various funds. The State statute further provides that the bonds of the district and accrued interest coupons detached from the bonds of the district, when presented, may be accepted as cash in payment of *assessments* levied for bond interest and principal but does not permit the acceptance as cash for the purchase price of land sold at tax sale. The delinquent land owner may redeem his land from the *assessment* by paying the *assessment* in bonds, interest and principal, prior to the tax sale, but not paying the purchase price of the tax sale, which is purchasing the land. So it is apparent that the manner of paying the purchase price at the tax sale for cash "or equivalent" to cash is superfluous and void and the attempt to here pay a part of the purchase price of the land at the tax sale in bonds, interest and principal, runs counter to the statute as it is uncertain to say that they are equivalent in worth or value as cash. No evidence appears that the bonds and bond interest coupons are equivalent to cash. The mere fact that they are a lien on the land does not establish that they are equivalent to cash of the amount of the bid. It will be remembered that the levies were assessments for maintenance of the District and to pay outstanding warrants issued by the District and the bonds and interest coupons of the defendant are not a lien upon the assessments levied for those special purposes, and yet those levies were

part of the taxes and assessments for which the land was sold, and those funds of the District are entitled to their prorata share of the purchase price brought by the land at the sale.

Whatever rights or remedies inure to the defendant or the holder of the bonds and warrants of the drainage district is provided for by the statute of the State and the defendant as such holder of the bonds will have to proceed in realizing on them in the manner provided for by the statute.

Therefore, under the laws of the State and the evidence disclosing a non-compliance with the statutes of the State by both parties, the attempted tax sale and the deeds issued to the defendant should be set aside and held void, and the defendant is required to execute deeds disclaiming any interest in the lands to the County, within thirty days and failure to do so the Clerk of this Court shall, as Commissioner, execute and deliver such deeds to the County, and the attempted cancellation of the bonds delivered by the defendant to the County should be set aside and the bonds and bond interest coupons be returned to him uncancelled, as the parties are still in the same situation as they were in prior to the attempted sale, and that an accounting be had as to whatever amounts the defendant has paid out on said attempted sale and subsequent taxes, and earnings of the defendant, if any, in the farming operations of the lands, and after the accounting is had the Court will then determine the rights and liabilities of the parties.

It is further concluded that the demand of the defendant as damages upon his alleged cross complaint is not sustained in view of the conclusions here reached upon the issues thus stated and evidence and principles of law applicable.

Accordingly an order is entered directing the accounting be had within sixty days and that in the event the parties do not agree upon one to take the account within ten days the Court reporter of this Court is directed to take the same.

No. 812

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JAN 29 1945
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CLERK

IN THE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1944

BOUNDARY COUNTY, IDAHO, a municipal corporation of the State of Idaho, by RAY SIMS, ROBERT H. HARTING and CHARLES SCHAUER, its County Commissioners, *Petitioners*,

v.

MARTIN WOLDSON, *Respondent.*

No. AS 812

REPLY BRIEF OF RESPONDENT TO APPLICATION FOR WRIT OF CERTIORARI

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